

October 22, 1992
REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

USE OF MINORITY BUSINESS ENTERPRISE/WOMEN BUSINESS
ENTERPRISE WEIGHTED CRITERIA IN THE CONSULTANT
SELECTION PROCESS

You have asked this office to define the legal implications if the City uses Minority Business Enterprise/Women Business Enterprise ("MBE/WBE") weighted criteria to award consultant contracts before a disparity study is finished.

DISCUSSION

As we have indicated previously in the attached extensive Memorandum of Law, a race-conscious remedy must be narrowly tailored to redress the consequences of provable discrimination. *City of Richmond v. Croson*, 488 U.S. 507, 508 (1989). An "indicator of a program's narrow tailoring is program flexibility. An important means of achieving such flexibility is through use of case-by-case utilization goals, rather than rigid numerical quotas or goals." *Coral Construction Company v. King County*, 941 F.2d 910, 924 (9th Cir. 1991).

Plans "that extended race-conscious remedies beyond territorial boundaries 'must be based on very specific findings that actions the City has taken in the past have visited racial discrimination on such individuals.'" *Associated General Contractors of California v. Coalition*, 950 F.2d 1401, 1414 (9th Cir. 1991). In other words, race-conscious remedies may not be lawfully extended to all members of a particular ethnic class simply because members of that class generally have been victims of discrimination. In order for an MBE to reap the benefits of a local MBE plan, it is necessary to determine if that MBE was ever victimized by discrimination in that locality. *Coral Construction*, 941 F.2d at 922.

Gender-specific remedial programs require a slightly different analysis. Intermediate scrutiny does not require any showing of governmental involvement, active or passive, in the discrimination it seeks to remedy. *Coral Construction*, 941 F.2d at 932. Some degree of discrimination must have occurred in a particular field before a gender-specific remedy may be

instituted in that field. Id.

Based on the current record, we do not advise proceeding with the use of MBE/WBE weighted criteria to award consulting contracts before a disparity study is completed and analyzed. We are mindful of the U.S. Supreme Court's admonition that a plan must have a "strong basis in evidence for the council's conclusion that remedial action was necessary." Croson, 488 U.S. at 469, 500 (quoting, Wygant v. Jackson Board of Education, 476 U.S. 267, 277 (1986)). Particularly, instructive are the steps San Francisco has taken to implement a MBE Plan in San Francisco where testimony was taken at ten (10) public hearings and there were numerous submissions from the public. Furthermore, San Francisco relied on a study which indicated large disparities existed between the award of city contracts to available non-minority-owned businesses and to MBE's. "Dozens of specific instances of discrimination" were laid out with particularity. Associated General Contractors, 950 F.2d at 1401. Our record is not as complete. We believe the City's current stated policy may reasonably be defended from attack from any side, because it is race and gender neutral. In addition, we need to be mindful of the gains the City has made since the current program was established in 1985. A change in MBE/WBE criteria to impose a weighted preference before completion of a study dramatically increases the City's risk of being challenged.

Moreover, a general weighted preference for MBE/WBE firm participation does not remedy specifically identified discrimination. There is no distinction between ethnic groups set forth in the weighted criteria. Contrast San Francisco, where "the City provides preferences only to those minority groups found to have previously received a lower percentage of specific types of contracts than their availability to perform such work would suggest." Id. at 1417. Here the proposed weighted criteria applies to any certified MBE regardless of past consulting experience with the City of San Diego.

Based on the current record, we believe the better course of action is to complete and analyze a disparity study before imposing MBE/WBE weighted criteria in the selection of consultants. To do otherwise is to gamble that results of a study will precisely mirror weighted criteria. At this time, we believe such action to be precarious in light of the City's potential burden of proof and the danger that extensive litigation could result and endanger the entire MBE/WBE program.

Respectfully submitted,
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Attachment

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